

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES - SAN FRANCISCO BRANCH**

KHAVKIN CLINIC, PLLC

and

**Cases 28-CA-220023
28-CA-223014**

MICHAEL SCHNEIER, an Individual

**GENERAL COUNSEL'S BRIEF
TO THE ADMINISTRATIVE LAW JUDGE**

Nathan A. Higley
Counsel for the General Counsel
National Labor Relations Board, Region 28
300 Las Vegas Boulevard South, Suite 2-901
Las Vegas, NV 89101
Telephone: (702) 820-7467
Facsimile: (702) 388-6248
Email: nathan.higley@nlrb.gov

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	ARGUMENT	1
A.	JURISDICTION	1
1.	Facts	1
2.	Authorities	1
3.	Argument	3
B.	RESPONDENT’S CONFIDENTIALITY/NON-DISCLOSURE AGREEMENT	3
1.	Facts	3
2.	Authorities	4
3.	Argument	5
C.	RESPONDENT DISCHARGES SCHNEIER	6
1.	Facts	6
a.	<i>The Inducement Payment/Loan</i>	7
b.	<i>Discharge Documents</i>	7
c.	<i>Failure to Report Procedures/Billing</i>	8
d.	<i>Unprofitability</i>	9
e.	<i>Negative Remarks and Protected Concerted Activity</i>	9
f.	<i>Failure to Respond to Communications</i>	12
g.	<i>Unauthorized Patient Transfer</i>	13
2.	Authorities	13
3.	Argument	15
a.	<i>The Inducement Payment/Loan</i>	15
b.	<i>Failure to Report Procedures/Billing</i>	16
c.	<i>Unprofitability</i>	16
d.	<i>Negative Remarks and Protected Concerted Activity</i>	17
e.	<i>Failure to Respond to Communications</i>	19
f.	<i>Unauthorized Patient Transfer</i>	20
III.	CONCLUSION	20

TABLE OF AUTHORITIES

Cases

Advanced Facial Plastic Surgery Center, PA,
2013 WL 2367922 (May 29, 2013)..... 2

Director, Office of Workers’ Comp. Programs v. Greenwich Collieries,
512 U.S. 267 (1994) 14

Durham School Services, L.P.,
360 NLRB 851 (2014)..... 14

Eastex, Inc. v. NLRB,
437 U.S. 556 (1978) 5

Electrolux Home Products,
368 NLRB No. 34 (2019)..... 14

Farmer Bros., Co.,
303 NLRB 638 (1991)..... 14

Fluor Daniel, Inc.,
304 NLRB 970 (1991)..... 14

Gravure Packaging, Inc.,
321 NLRB 1296 (1996)..... 13

Greenlawn Funeral Home,
249 NLRB 1067 (1980)..... 2

J. S. Latta & Son,
114 NLRB 1238 (1955)..... 2

Manno Electric, Inc.,
321 NLRB 278 fn.12 (1996) 14

Merrilat Industries,
307 NLRB 1301 (1992)..... 14

Meyers Industries (Meyers II),
281 NLRB 882 (1986)..... 13

Mike Yurosek & Son, Inc.,
306 NLRB 1037 (1992)..... 13

NCR Corp.,
313 NLRB 574 (1993)..... 5

NLRB v. Fainblatt,
306 U.S. 601 (1939) 1

NLRB v. Transportation Management Corp.,
462 U.S. 393 (1983) 13, 14

Providence Hospital,
285 NLRB 320 (1987)..... 5

Roland Electric Co. v. Walling,
326 U.S. 657 (1946) 2

Roure Bertrand Dupont, Inc.,
271 NLRB 443 (1984)..... 14

Siemons Mailing Service,
122 NLRB 81 (1958)..... 2

Stanford Hospital & Clinics v. NLRB,
325 F.3d 334 (D.C. Cir. 2003) 5

Taft Broadcasting Co.,
238 NLRB 588 (1978)..... 14

The Boeing Company,
365 NLRB No. 154 (2017)..... 4

Victoria Medical Group,
264 NLRB 99 (1982)..... 2

Wright Line,
251 NLRB 1083 (1980)..... 13, 14

I. INTRODUCTION

In order to find that Khavkin Clinic, PLLC (the Respondent) did not violate the Act as alleged in the Complaint, Your Honor must ignore the black-and-white language of a rule in Respondent's employee handbook. Further, Your Honor would need to ignore testimony offered by Respondent's own witness confirming Michael Schneier's (Schneier) protected concerted activity and Respondent's widely varying explanations for why it discharged Schneier. Counsel for the General Counsel (CGC) urges Your Honor to give due consideration to the balance of the evidence, which establishes that Respondent maintained an unlawful rule and discharged Schneier because of his protected concerted activity, and order an appropriate remedy.

II. ARGUMENT

A. JURISDICTION

1. Facts

Respondent is a medical clinic providing spine and cranium surgery to members of the public in Las Vegas, Nevada. It began operations in 2013. Tr. 63. Yevgeniy Khavkin (Khavkin) is the owner of the clinic, and he works as a surgeon within the practice. Schneier was employed from July 2016 to November 21, 2017. Tr. 177. Ippei Takagi (Takagi) was hired before Schneier and is currently employed as a surgeon by Respondent. Tr. 84.

In 2017, Respondent had gross revenue in excess of \$5,000,000.¹ GCX 2(a). During that same period, Respondent made payments totaling over \$70,000 to a Texas-based company called ProAssurance for malpractice insurance. GCX 21, Tr. 446-447.

2. Authorities

The Board's jurisdiction under the Act extends to all cases involving enterprises whose operations affect interstate commerce. See *NLRB v. Fainblatt*, 306 U.S. 601, 606-607 (1939).

¹ In other years, Respondent's revenue rose as it hired additional surgeons. Tr. 84-85.

The Board has therefore established discretionary jurisdictional standards based on the volume and character of the business. See *Siemons Mailing Service*, 122 NLRB 81, 83-84 (1958). The threshold question is whether an employer operates a retail or nonretail establishment.

The Board applies the retail standard to employers who sell goods or services to a purchaser who “desires to satisfy his own personal wants or those of his family or friends.” *J. S. Latta & Son*, 114 NLRB 1238, 1249 (1955) (adopting definition formulated in *Roland Electric Co. v. Walling*, 326 U.S. 657, 674 (1946)). In *Carolina Supplies & Cement Co.*, the Board decided that it would assert jurisdiction over retail enterprises that do a gross volume of business of at least \$500,000 annually. 122 NLRB 88, 89 (1958). The Board applies this standard to the total operations of an enterprise whether it operates in one or more states. *Id.* For retail establishments, the Board may apply only a gross volume of business standard.² *Id.*; see *Greenlawn Funeral Home*, 249 NLRB 1067 (1980) (finding jurisdiction over a retail establishment solely on the basis of annual revenue).

In *Victoria Medical Group*, 264 NLRB 99 (1982), the Board asserted jurisdiction over an outpatient medical clinic, finding that the employer was engaged in commerce within the meaning of the Act based on the fact that the employer had derived gross revenues in excess of \$250,000 and had received revenue in excess of \$10,000 from Medicare, a federally-funded program. See also *Advanced Facial Plastic Surgery Center, PA*, 2013 WL 2367922 (May 29, 2013) (asserting jurisdiction over surgical clinic based on revenue over \$250,000 and out-of-state purchases over \$5,000).

² Regarding the Board’s past practice of accounting for purchases, the Board stated:
The ascertainment of inflow figures often involves extensive examination of an employer’s records in which every purchase must be considered, which is time-consuming both for personnel of the employer involved and the Board. Gross volume of business figures on the other hand are readily obtainable and their production places no hardship upon employers. Accordingly, in the interests of expediting the handling of the increased volume of retail cases...the Board decided to apply *only* a gross volume of business standard to such enterprises.
Id. (emphasis added).

3. Argument

It is undisputed that Respondent offers services to members of the public for their personal medical needs. Thus, Respondent meets the definition of a retail operation. The documentary evidence establishes definitively that Respondent had revenue in excess of \$5,000,000 and that it made payments in excess of \$70,000 during the relevant time period. These facts satisfy the Board's criteria for asserting jurisdiction over retail operations. The case law cited herein demonstrates that the Board has asserted jurisdiction over medical clinics under these circumstances, and CGC is aware of no precedent to the contrary. CGC respectfully requests that Your Honor find that the Board has jurisdiction over Respondent.

B. RESPONDENT'S CONFIDENTIALITY/NON-DISCLOSURE AGREEMENT

1. Facts

At the time Schneier worked for Respondent, Respondent maintained an employee handbook, GCX 3. Tr. 85, 87. Page 20 of GCX 3 contains a "confidentiality/non-disclosure agreement" with the following wording:

As used herein, "Confidential Information" shall mean any and all technical and non-technical information related to Yevgeniy A Khavkin MD PC provided by either party to the other, including but not limited to client(s) personal and professional information, Yevgeniy A Khavkin MD PC trade secrets, business proprietary information-ideas, techniques, know-how, processes, software programs, and formula related to the current, future and proposed products and services of Yevgeniy A Khavkin MD PC, and including, without limitation, their respective information concerning research, development, financial information, procurement requirements, purchasing, customer/patient lists, investors, employees, business and contractual relationships, business and contractual relationships, business forecasts, sales, and merchandising, marketing plans and information the disclosing party provides regarding third parties, or anything else relating to Yevgeniy A Khavkin MD PC.

I agree that at all times and notwithstanding any termination or expiration of this agreement I will hold in strict confidence and not disclose to any third party Confidential Information, nor solicit client or employees or

Yevgeniy A Khavkin MD PC for any reason except as approved in writing by the president of Yevgeniy A Khavkin MD PC.

This agreement shall remain binding for two years after termination of employment.³

At hearing, Respondent stipulated that this portion of GCX 3 was in effect and applied to employees at the time of Schneier's termination.⁴ Tr. 87-88. Beyond the content of the rule itself, Respondent proffered no evidence regarding the rule's purpose. Tr. 89-90. There is no evidence the rule has ever been enforced. Tr. 90.

2. Authorities

In *The Boeing Company*, 365 NLRB No. 154 (2017) (*Boeing*), the Board held that, when evaluating rules that, when reasonably interpreted, would potentially interfere with employees' rights under Section 7 of the Act, it will balance the nature and extent of the potential impact on Section 7 rights against legitimate justifications associated with the rule. *Id.* slip op. at 3. In conducting this evaluation, "when a rule, reasonably interpreted, would prohibit or interfere with the exercise of NLRA rights, the mere existence of some plausible business justification will not automatically render the rule lawful." *Id.* at 16. The Board delineated three categories of rules:

- Category 1 will include rules that the Board designates as lawful to maintain, either because (a) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of Section 7 rights; or (b) the potential adverse impact on protected rights is outweighed by justifications associated with the rule. An example of a Category 1(a) rule are rules requiring employees to abide by basic standards of civility, and an example of a Category 1(b) rule is the no-camera requirement at issue in *Boeing*.

³ The entity named in this rule, Yevgeniy A Khavkin MD PC, is the name under which Respondent operated previously. As evidence that this designation was merely a name change, Khavkin testified that the former name used the same tax identification number as the current name. Tr. 89. Furthermore, although not explicitly admitted, Respondent's Answer asserts that it maintained a rule whose wording is identical to the wording of the rule contained in the Complaint.

⁴ Respondent's counsel was careful to limit the stipulation in that Respondent did not stipulate that the wording in GCX 3 applied to Schneier. See Tr. 87-88. CGC is not relying on the unlawful rule allegation as support for its unlawful discharge allegation.

- Category 2 will include rules that warrant individualized scrutiny in each case as to whether the rule would prohibit or interfere with Section 7 rights, and if so, whether any adverse impact on Section 7-protected conduct is outweighed by legitimate justifications.
- Category 3 will include rules that the Board will designate as unlawful to maintain because they would prohibit or limit Section 7-protected conduct, and the adverse impact on Section 7 rights is not outweighed by justifications associated with the rule. An example would be a rule that prohibits employees from discussing wages or benefits with one another.

Id. at slip op. at 3-4.

The right to communicate with other employees about terms and conditions of employment and the right to publicize a labor dispute with an employer are core Section 7 rights. *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978); *Stanford Hospital & Clinics v. NLRB*, 325 F.3d 334, 343 (D.C. Cir. 2003); *NCR Corp.*, 313 NLRB 574, 576 (1993); *Providence Hospital*, 285 NLRB 320, 322 (1987).

3. Argument

Respondent's confidentiality/non-disclosure agreement is unlawful under the *Boeing* standard. The rule's definition of confidential information as "any and all technical and non-technical information related to [Respondent]" including "employees...or anything else relating to [Respondent]" needs no interpretation; a plain reading of the rule makes it clear that Respondent considers all of its information confidential.

The rule explicitly states that employees are prohibited from disclosing this virtually all-encompassing category of information to any third party at any time while employed by Respondent or up to two years after their employment relationship with Respondent ends. In this manner, the rule explicitly prohibits disclosure of information. It thereby directly interferes with

employees' core right to communicate with third parties, such as labor unions, about their working terms and conditions.

Moreover, the rule forbids employees from soliciting any such information, including from other employees, thereby preventing communication between employees about their working terms and conditions. A reasonable reading of the rule would leave employees with the belief that they may not, for example, ask each other about wages. Permitting Respondent to prohibit employees from obtaining information necessary to discover the working terms and conditions of other employees effectively eliminates the precursor to most protected concerted activity.

Respondent's rule directly interferes with employees' core Section 7 rights, and Respondent identified no interest warranting maintenance of this broad restriction. Although Respondent may have an interest in preventing employees from disclosing some matters, such as protected medical information, Respondent cannot genuinely argue that its rule is tailored to that interest or that its rule does not sweep much more into its coverage.

CGC respectfully requests that Your Honor find that the rule here is unlawfully broad.

C. RESPONDENT DISCHARGES SCHNEIER

1. Facts

Khavkin and Schneier have known each other for 20 years. Tr. 174. They met while Schneier was fellow at the University of New Mexico, and Khavkin was a resident under Schneier's supervision. Tr. 176, 287-288. For several years after their fellow-resident relationship ended, Khavkin and Schneier kept in touch, and in 2016, Khavkin approached Schneier about moving from California to Nevada to work for Respondent. Tr. 288-290. Schneier accepted and was employed by Respondent chiefly to perform cranial surgery. Tr. 96.

a. *The Inducement Payment/Loan*

Schneier was to receive a salary of \$40,000 per month. Tr. 291. In order to induce Schneier to accept the employment offer, Respondent paid Schneier additional payments totaling about \$165,000, which Schneier was to repay in succeeding months from any revenue he generated that exceeded his monthly salary. Tr. 248-249, 291-293, 398, 462-463. The inducement payment arrangement was not reduced to writing. Tr. 247-248. There is no dispute that Schneier did not repay any of the inducement money. Tr. 249. According to Khavkin, Schneier began to outright refuse to repay it in January 2017. Tr. 248.

Schneier explained that his agreement to repay the inducement payment was based Respondent's guarantee that it would aid Schneier in generating revenue above his base salary, and as of the date Respondent discharged him, Respondent had not fulfilled its commitment. Tr. 405. According to Respondent's then-CEO, Leonard Linton (Linton), in the months preceding Schneier's discharge, Respondent approached Schneier on one occasion and asked him to sign a promissory note. Tr. 454-455. Schneier refused.

b. *Discharge Documents*

Khavkin directed Linton to draft a letter to Schneier to inform him that his employment was terminated. Tr. 131, 451. Linton drafted the letter based on Khavkin's "specific directions of what need[ed] to be included." Tr. 131, see also 451-452. Khavkin reviewed the letter, dated November 21, 2017, before it was sent. Tr. 131. The letter stated that Schneier's employment was terminated because of (1) "several prior breaches of the terms of [his] employment" and (2) for failing to "report any surgeries [he had] performed for billing during the last several weeks." The letter added that Schneier "also made several derogatory and accusatory comments

concerning other surgeons with” Respondent. Lastly, the letter indicated that Khavkin texted and called Schneier but that Schneier had not responded. GCX 8.

In an affidavit completed on December 28, 2018, Khavkin reiterated these reasons: “Dr. Schneier was discharged from his employment because” he failed to perform/bill for surgeries, he made derogatory comments about other surgeons, and he failed to respond to Khavkin’s attempts to contact him. GCX 14, p.3. After elaborating the reasons for Schneier’s discharge in GCX 14, in the next paragraph Khavkin goes on to mention “separately” a loan.

At the unfair labor practice hearing, Khavkin explained that Schneier’s “several prior breaches” mentioned in GCX 8 were his failure to perform sufficient procedures to be profitable, his failure to submit his procedures for billing, the lack of professionalism that his negative comments demonstrated, and refusing to see patients that were referred to him. Tr. 127-129. Those were the “main breaches.” Tr. 128. Unprompted, Khavkin then added that Schneier had requested that Respondent’s scheduler, Nicole Blanco (Blanco) move a patient scheduled to see Khavkin to Schneier’s schedule. Tr. 129.⁵

c. *Failure to Report Procedures/Billing*

Unlike scheduled procedures, when Respondent’s surgeons perform procedures while on-call, they must communicate certain information about the procedure to Respondent’s biller so that the biller may bill for the service.⁶ Tr. 257, 532. Schneier habitually did so in an untimely manner, or he would provide the information to someone other than the biller. Tr. 533. This problem arose shortly after Schneier was hired, and it persisted through the entire course of his

⁵ In response to leading questions from Respondent’s counsel, Khavkin confirmed that he discharged Schneier due to a failure to report procedures, Schneier’s comments, failure to repay his loan, failure to respond to Khavkin’s attempts to contact him, failure to make a profit, and Schneier’s attempt to move one of Khavkin’s patients to his schedule. Tr. 249-250.

⁶ Although unclear in GCX 8 and 14, Respondent’s testimony clarified that this issue only relates to unscheduled procedures. For regular scheduled procedures, Respondent acquires the necessary billing information prior to performing the procedure.

employment. Tr. 131-132, 536-537. Khavkin purportedly attempted to address this issue with Schneier, though none of his attempts were documented. Tr. 132. Schneier performed regularly-scheduled work for Respondent during the week of November 12, 2017. GCX 4, 5, and 10, p. 38. In addition, Schneier reported his on-call procedures for the week to Respondent on November 17, 2018. Tr. 335-336, 525; GCX 7.

d. *Unprofitability*

Khavkin testified that Schneier's failure to perform sufficient procedures to be profitable was a constant problem from the time he was hired. Tr. 136-137, 151. Between May and November 2017, Schneier billed a total of approximately \$6,500,000 in services of which Respondent expected to collect about \$923,000 – compared to \$1,200,000 Respondent expected to collect for Khavkin's work.⁷ GCX 12 and 13. Regarding this shortfall, Schneier pointed out that the procedures he chiefly performed, cranial surgeries, were more time-consuming. Tr. 380-381. Schneier provided evidence that Khavkin treated patients who were referred to Schneier. Tr. 338-339, GCX 9. Schneier also stated that Khavkin actively inhibited his marketing efforts. Tr. 338-341.

e. *Negative Remarks and Protected Concerted Activity*

Khavkin testified that Schneier had a habit of speaking negatively about others since the time Khavkin first met him. Tr. 174. Schneier apparently demonstrated a continuation of this habit within months of being hired. Tr. 562-563. According to Khavkin, Schneier gave "false and reckless opinion" about other doctors' abilities. GCX 14, p.1. Specifically, shortly after Respondent hired, Khavkin claims he learned that Schneier had made negative comments about

⁷ It appears, however, that Khavkin's records include some procedures not performed by him. Tr. 279-280, GCX 20.

Dr. Jaswinder Grover (Grover),⁸ specifically, calling him the “N-word”; about six months before Respondent discharged Schneier, that Schneier had made negative comments to Dr. V.J. Kostanian (Kostanian), specifically telling him to “fuck off”; and about five months⁹ before Respondent discharged Schneier, that Schneier had made negative comments about Dr. Sep Bady (Bady). Tr. 158, 171, 172, 173-174. Khavkin claims that Schneier described other doctors as “hack surgeons.” GCX 14. At hearing, Khavkin characterized Schneier’s comments as racist and chauvinistic. Tr. 125. According to Khavkin, those doctors contacted him directly. Tr. 158. Additionally, from the time he was hired, Schneier made frequent negative comments about Ippei Takagi. Tr. 163-165.

All of these incidents were reported to Khavkin orally, but Khavkin failed to document them. Tr. 173. At the time of Schneier’s discharge, he and Khavkin and Takagi were the only surgeons working for Respondent. Tr. 91-92. Khavkin stated that he did not discharge Schneier at the time he learned of Schneier’s comments because he believed Schneier “would still be able to come around.” Tr. 178.

Schneier denied speaking negatively about Grover,¹⁰ Kostanian, or Bady. In fact, Schneier regularly contacts Kostanian for consultation and has maintained a cordial professional relationship, both before and after the time Khavkin alleges Schneier told Kostanian to “fuck off.” Tr. 365-366, GCX 18. Schneier does not use the term “hack surgeon” but has heard Khavkin use the term to describe Grover. Tr. 355. Regarding Grover, Schneier vehemently denies calling him the “N-word.” Tr. 354-355. Schneier explained that he was asked to give an

⁸ As his name indicates, Jaswinder Grover is of Indian origin. Tr. 354-355.

⁹ Later, Khavkin could not recall when this occurred. Tr. 498.

¹⁰ In contrast, Schneier complained to Khavkin that Grover had made an anti-Semitic comment about him – according to Khavkin, Grover said about Schneier, “...here’s another Jew in town,” which Khavkin took as a joke. Tr. 167-168, 169-170. Schneier is Jewish. Tr. 170, 325. He did not take Grover’s comment as a joke. Tr. 351-352.

opinion about Grover's work on one occasion in connection with a personal injury lawsuit, but Schneier declined to do so. Tr. 352-353. Schneier admits that he expressed concerns to Khavkin about Takagi's work. Tr. 349-350. Khavkin responded that Takagi was useful; he demonstrated no concern over Schneier's report. Tr. 350. Even so, Takagi regularly requested and received help from Schneier, even apologizing for "dump[ing]" patients on him. GCX 17, p.2; Tr. 360-365, 500-503.

On December 28, 2018, approximately seven months before the hearing in this matter, Khavkin completed a sworn affidavit. GCX 14. In that affidavit, Khavkin claimed that Schneier's negative comments pertained to personal injury cases and were made specifically about Khavkin, Takagi, Grover, and a Dr. Kucera.¹¹ There is no mention of Kostanian or Bady.

Schneier admitted to saying negative things about Khavkin's behavior. Khavkin acknowledged that he gets angry when his high standards are not met. Tr. 568, see also 560-561. This was a matter of concern to employees, who discussed their concerns with Schneier. Tr. 296, 310-312, 322-323, 424, 426-429, 431. Employees felt comfortable talking to Schneier. Tr. 430-431, GCX 20.¹² Schneier shared their concerns and opined openly that Khavkin's treatment of employees was improper. Tr. 296-298, 555-556, 561-562. Schneier discussed some of these concerns directly with Khavkin, but he did not view his behavior as problematic. Tr. 297, 311. Specifically, in around June 2017, Schneier complained to Khavkin on behalf of a coworker Carla Argueta (Argueta). Tr. 312. Argueta worked in multiple capacities for Respondent. Tr. 419. Schneier was key to her recruitment. Tr. 312-313. Schneier told Khavkin that he needed to

¹¹ Khavkin did not explain why he did not mention Kucera on the stand. Tr. 182.

¹² In that exhibit, Catrice Jerry, Respondent's scheduler, refers to Schneier as "sunshine" (p.1) and over a month later asks him to act as a job reference (p.6). Tr. 260, 383. There was ample discussion of the admissibility of this exhibit during the hearing. See Tr. 384-387. CGC did not offer GCX 20 to show protected concerted activity or establish any factual assertion; rather, the purpose is to show Catrice Jerry's state of mind in how she regarded Schneier when she sent the texts, which is an exception to the rule against hearsay. FRE 803(3).

control his temper, that he should not inquire about Argueta's romantic engagements¹³ and that he should not look through her phone. Tr. 315-316. Khavkin dismissed Schneier's concerns. Tr. 316.

Schneier also shared with Khavkin his and other employees' concerns with turnover. Tr. 238, 258, 304. Argueta worked for Respondent from September 2016 to October 2017. Tr. 424. Since 2017, at least two CEOs have come and gone. Tr. 258, 449-450. During that same time period, at least three office managers¹⁴ have come and gone. Tr. 259-260. Both of the employees Schneier recommended for employment – Joseph DeLappi and Carla Argueta – are no longer employed by Respondent. Tr. 137, 139, 309. Respondent admitted it went through multiple billers.¹⁵ Tr. 258. Nevertheless, Khavkin denies that Respondent's turnover is a problem. Tr. 238.

f. *Failure to Respond to Communications*

Regarding Respondent's reasons for discharging Schneier, Khavkin stated that the "biggest issue was the lack of responsiveness", in that Schneier had failed to respond to multiple texts, phone calls, and emails about his failure to perform procedures or submit billing in the weeks prior to his discharge. Tr. 129, see also GCX 8, 14. Schneier denies receiving any communications, including in-person conversations, with Respondent about his billing practices in the weeks prior to his discharge. Tr. 331-332. On November 16, 2018, Khavkin texted Schneier to ask him to perform multiple procedures, but Schneier responded that he would be out of town. GCX 4. There is no mention of any other issues.

¹³ The incident that apparently prompted Khavkin's complained-of behavior was his hearing that Argueta was romantically involved with Khavkin's business competitor. Tr. 313.

¹⁴ One was Tonya Gottesman, who worked for Respondent for a year. Tr. 543. Another was Jack Senseney, whose husband remains an employee of Respondent. Tr. 259-260, 297.

¹⁵ Among them was Respondent's witness, Tammy Theirault, who was rehired the week of the hearing. Tr. 530.

g. *Unauthorized Patient Transfer*

Although not mentioned in GCX 8¹⁶ or 14, Respondent claims that in the week before discharging Schneier, Schneier took a file pertaining to one of Khavkin's patients from Respondent's scheduler, Nicole Blanco, and instructed Blanco not to tell Khavkin that he had taken it. Tr. 129, 345, 517. Schneier admits he likely took over the care of multiple patients pertaining to Khavkin due to patient requests for follow-up procedures, and he admitted that he might conceal the fact in some instances to ensure that the patient was seen instead of having Khavkin prohibit the procedure. Tr. 374-380.

2. Authorities

Section 8(a)(1) of the Act prohibits employer interference, restraint, or coercion of its employees in the exercise of their rights under Section 7 of the Act. Section 7 of the Act secures employees' right to engage in concerted activities for the purpose mutual aid or protection. Protected concerted activity includes "circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management." *Meyers Industries (Meyers II)*, 281 NLRB 882, 887 (1986). This includes concerns expressed by an individual which are a "logical outgrowth" of other concerted activity. *Mike Yurosek & Son, Inc.*, 306 NLRB 1037, 1038 (1992).

Allegations of unlawful discrimination under Section 8(a)(1) of the Act is governed by the framework set forth in *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Under *Wright Line*, the existence of a violation turns on an analysis of the employer's motivation. *Gravure Packaging, Inc.*, 321 NLRB 1296, 1304 (1996). The

¹⁶ Linton stated that Khavkin never mentioned this issue, neither Schneier's taking a patient nor directing an employee to lie to him. Tr. 455.

General Counsel must make an initial showing that animus toward the protected activity was a substantial or motivating factor for the employer's action. *Fluor Daniel, Inc.*, 304 NLRB 970, 970 (1991). To do so, the General Counsel must show by a preponderance of the evidence that the employee was engaged in protected activity, that the employer had knowledge of that activity, and that the employer's hostility to that activity "contributed to" its decision to take an adverse action against the employee. *Director, Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 278 (1994), clarifying *NLRB v. Transportation Mgt.*, 462 U.S. 393, 395, 403 n.7 (1983); *Wright Line*, 251 NLRB at 1089.

If the General Counsel carries its initial burden, the burden then shifts to the employer to prove, as an affirmative defense, that it would have taken the same action even in the absence of the protected activity. See *Manno Electric, Inc.*, 321 NLRB 278, 280 fn.12 (1996); *Farmer Bros., Co.*, 303 NLRB 638, 649 (1991). To meet this burden "an employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence, *Merrilat Industries*, 307 NLRB 1301, 1303 (1992), that the same action would have taken place even in the absence of the protected conduct." *Roure Bertrand Dupont, Inc.*, 271 NLRB 443, 443 (1984); *Durham School Services, L.P.*, 360 NLRB 851 (2014).

In *Electrolux Home Products*, 368 NLRB No. 34 (2019), the Board explained that animus toward an employee's protected activity may be inferred from the pretextual nature of an employer's proffered justification as long as the surrounding facts support such an inference. *Id.*, Slip op. at 3. When an employer presents shifting defenses for its actions, this too may be evidence of unlawful motive. *Taft Broadcasting Co.*, 238 NLRB 588, 589 (1978).

3. Argument

It was common knowledge, and Respondent acknowledges, that Schneier communicated with other employees about their concerns over various working conditions, including Khavkin's treatment of employees. Respondent similarly acknowledges that Schneier communicated these concerns to Khavkin. The elements of protected concerted activity and Respondent's knowledge of that activity are satisfied beyond reasonable dispute. As is often the case, the question here is why Respondent discharged Schneier. Respondent has proffered multiple reasons – some provided at the outset on the day of the discharge, and some additional reasons provided during the hearing. This is not merely a case of pretext but of shifting explanations.

a. *The Inducement Payment/Loan*

Respondent's claim that it discharged Schneier because he did not pay back the inducement payment/loan is dubious. The termination letter, GCX 8, whose content was provided to Linton by Khavkin and which Khavkin reviewed before it was sent, makes no mention of a debt. Even in a sworn affidavit Khavkin created a month later, GCX 14, Khavkin did not list debts owed as a reason for Schneier's discharge; rather, he listed three specific reasons why Schneier was discharged, then in a new paragraph beginning with the word "separately," he described the debt. GCX 14 is a demonstrably well-thought, organized document. Therefore, the care taken in making this separation indicates that the exclusion of the debt from the reasons listed for discharge was intentional and indicative of the fact that the debt was not one of the reasons.

Of course, Respondent – and anyone else, for that matter – would be concerned over a debt of this size, but the fact that mention of the debt was omitted from GCX 8 and pointedly omitted from the reasons for discharge in GCX 14 is telling. Respondent's raising this factor as

a basis for discharge for the first time during the hearing indicates that the reason is not only pretextual, it represents a shift in the reasons proffered. This allegation is peculiar in another manner. In light of Respondent's claims that Schneier repaid none of the inducement money, that he fully refused to pay in January 2017, and that he further refused to sign a promissory note months before his discharge; it is a mystery why Respondent would wait until November 2017 to discharge him for it.

b. *Failure to Report Procedures/Billing*

Although Respondent seemed to establish that there were consistent issues with Schneier's timely reporting his on-call procedures, there are two problems with Respondent's claim that it discharged him for it. First, whatever Schneier's behavior in the past, GCX 7 demonstrates that Schneier promptly responded to Respondent's inquiry about his procedures and thereby reported his procedures. Indeed, he provided information of an additional procedure to complete Respondent's billing records.

Second, Theirault testified that Schneier had a problem reporting his on-call procedures virtually from the time he was hired and consistently until his discharge. Respondent pointed to no spike or special incident that represented a departure from his normal behavior, behavior that Respondent had tolerated for over a year.

Finally, GCX 7 proves that Respondent's claim that Schneier performed or reported no surgeries during the weeks prior to his discharge is false. Respondent knew it was false. This claim is a pretext for Schneier's discharge.

c. *Unprofitability*

Khavkin's claim that Schneier was discharged for being unprofitable is rife with problems. This issue was never mentioned explicitly in GCX 8 or 14. Those documents refer

only to behavior exhibited within the weeks preceding Schneier's discharge. The claim that Schneier was perpetually unprofitable appears to be another effort to pile on justifications.

At a salary of \$40,000 per month, Respondent was paying Schneier \$480,000 per year. Adding a liberal estimate¹⁷ of 50 percent – \$240,000 – for employer-paid taxes, benefits, and Schneier's share of overhead, plus a rounded-up figure of \$20,000 thousand for Schneier's medical malpractice insurance policy (see GCX 21 and 22), plus the entirety of the \$165,000 debt, that total amount equals \$905,000. That figure is less than the \$923,000 Respondent expected to collect for Schneier's work during the seven months accounted for in GCX 12. The \$905,000 annual cost figure is lower still than the easily-extrapolated *annual* figure Respondent might expect to collect for Schneier's work: \$1,580,000.¹⁸

Assuming, however, that Khavkin's claim is true, and he lost money every month that he employed Schneier, it is baffling why Khavkin, as Respondent's sole proprietor, did not discharge Schneier until 17 months passed. One is left to conclude either that money is no object to Respondent – in which case, it would not have discharged Schneier for losing money (or for an unpaid debt) – or that this claim is false.

d. *Negative Remarks and Protected Concerted Activity*

Based on the record as a whole, it is clear that Khavkin is demanding of his employees. Given the great impact that surgeons' work has on patients and the high standards that medical professionals face, Khavkin is justified in being demanding. But the testimony demonstrates that the atmosphere at Respondent's facility is beyond demanding. Khavkin's rude behavior toward

¹⁷ Admittedly, this calculation is imprecise, but Respondent's claim that Schneier is unprofitable is entirely dependent on Khavkin's testimony. The calculation is based on what documentary evidence is available.

¹⁸ This figure is lower than Khavkin's, but it still represents a significant profit. Further, Schneier's superior ability with cranial surgery surely made him valuable to Respondent, despite the fact that the increased time required for such surgeries contributed to his lower earnings.

employees,¹⁹ his invasion of their privacy, and the constant feeling that their jobs were at risk were sufficiently troubling that employees felt it necessary to speak with Schneier. Although evaluation of turnover is a subjective matter, it does seem unusual that Respondent went through multiple CEOs, office managers, and billers in just two years. Indeed, of the eight managers/supervisors listed in the original Complaint²⁰ in this matter, only Khavkin and his brother-in-law, Linton, remain with Respondent.

There are multiple reasons to doubt Respondent's claim that it discharged Schneier for making negative comments about other doctors. Assuming that Schneier made frequent negative comments, as alleged, Khavkin hired Schneier despite knowing for two decades that he had a tendency to behave this way. Had Khavkin harbored any hope that this might have changed, that hope should have vanished when, according to Respondent, Schneier exhibited the same behavior right after being hired. Instead, Respondent tolerated the behavior.

The claims themselves are dubious. Khavkin went from claiming in his affidavit, GCX 14, pp.1-2, that Schneier made false and derogatory comments about doctors' abilities to claiming at hearing that Schneier's comments were chauvinistic and racist, including use of the "N-word." Khavkin's claim at hearing that Schneier's comments were chauvinistic is odd, considering that Schneier and all three doctors Khavkin mentioned are male.²¹ His claim that Schneier referred to Grover using the "N-word" is likewise odd considering Grover's Indian ethnicity, Schneier's sensibilities, and the fact that Khavkin omitted any mention of this in GCX

¹⁹ Respondent elicited testimony that Schneier was rude to Respondent's employees. At no point did Respondent allege that this contributed to the decision to discharge him. Should Respondent seek to conflate negative comments about other doctors with rude behavior toward employees, CGC respectfully requests that Your Honor summarily ignore such an argument as irrelevant or consider it an additional shifting explanation. In any case, no discussion of that subject will be provided in this brief.

²⁰ CGC orally amended the complaint during hearing to remove Argueta. Tr. 421-424.

²¹ Although not common English names, the fact that both "Sep" and "Jaswinder" are normally names for males is easily ascertained; and Kostanian was referred to using male pronouns. Tr. 365-366.

14. On the whole, Khavkin's claims about Schneier's comments about Grover seem inflated for effect. Similarly, Khavkin's claim about that Kostanian complained to him that Schneier told Kostanian to "fuck off," if true, would make Kostanian's overtly friendly communications with Schneier unusual. It is also an odd proposition that Schneier would tell a colleague upon whom he relies for professional consultation to "fuck off."

Taking the flimsy claims regarding Grover and Kostanian into account, the credibility of Khavkin's generic claims about other doctors – including Kucera, whom he failed to mention until prompted by CGC's reference to GCX 14 – should also be viewed with suspicion. Regarding Takagi, it is evident that he was not overly upset by Schneier's alleged comments about him or other doctors. There is no evidence Takagi complained of any of Schneier's comments in written form, including in text exchanges with Schneier that included non-work related banter, a few "thank yous", and a graphic of Elmo. Finally, if Khavkin were, as he claims, so deeply disturbed by these comments that he discharged Schneier because of them, it is baffling that he waited months for Schneier to "come around" and did not think to document the comments in the meantime. The weight of the evidence indicates that this reason is pretextual.

e. *Failure to Respond to Communications*

Respondent's claim that Schneier refused to respond to multiple calls, texts, and emails is demonstrably false. Not only did Respondent not produce copies of the alleged emails or a call log, the sole text exchange in evidence between them during the time period at issue occurred just a few days before his discharge, and it shows Khavkin requesting that Schneier perform certain procedures, and Schneier promptly responding. There is no mention of billing or reporting issues. Like the other reasons Respondent provided, this is a pretext.

f. *Unauthorized Patient Transfer*

Respondent did not claim that it discharged Schneier for taking a patient file until the hearing. It was not mentioned even implicitly in GCX 8 or 14. Even at hearing, Khavkin seemed to mention it as an afterthought. Given the combined testimonies of Khavkin, Blanco, and Schneier; it is likely that Schneier did indeed request that Blanco transfer a patient from Khavkin's care to his own and possibly tell Blanco not to mention the fact to Khavkin. Respondent's eleventh-hour invocation of this incident, however, indicates that it did not enter into its consideration when it discharged Schneier.

What this incident does demonstrate is that Khavkin does not tolerate disloyalty, going so far on another occasion as to examine an employee's phone because of suspicions that she was involved with a competitor. With Schneier's continued advocacy on behalf of employees, in Khavkin's view, there was good reason to discharge him. CGC respectfully requests that Your Honor find that Respondent did.

III. CONCLUSION

The record evidence unquestionably establishes that the Board has jurisdiction over Respondent. Turning to Respondent's confidentiality/non-disclosure agreement, the sparse record in this regard makes a proper analysis simple. The rule is clearly overbroad. Finally, Respondent's reasons for discharging Schneier – including the reasons not raised until the hearing – range from demonstrably false to incredible. The record demonstrates that Schneier

was a vocal critic of Respondent's practices and a vocal advocate for employees' concerns, and that he was discharged for it. CGC respectfully requests that Your Honor so find.

A proposed notice to employees is attached.

Dated at Las Vegas, Nevada this 3rd day of October 2019.

/s/ Nathan A. Higley

Nathan A. Higley
Counsel for the General Counsel
National Labor Relations Board, Region 28
300 Las Vegas Boulevard South, Suite 2-901
Las Vegas, NV 89101
Telephone: (702) 820-7467
Facsimile: (702) 388-6248
E-Mail: nathan.higley@nrlb.gov

(To be printed and posted on official Board notice form)

FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose a representative to bargain with us on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT interfere with your right to engage in protected concerted activities, including raising concerns with other employees about your wages, hours, and working conditions, or acting together with other employees to raise such concerns with us.

WE WILL NOT maintain in our employee handbook rules that interfere with your right to share information about employees or terms and conditions of employment when exercising the above rights, including a Confidentiality/Non-Disclosure Agreement defining “Confidential Information” as including information about employees or anything else relating to the company.

WE WILL NOT fire you because you engage in protected concerted activities.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

WE WILL offer **MICHAEL SCHNEIER (SCHNEIER)** immediate and full reinstatement to his former job, or if that job no longer exists, to substantially equivalent positions, without prejudice to his seniority or any other rights and/or privileges previously enjoyed.

WE WILL make whole **SCHNEIER** whole for any loss of earnings and other benefits suffered as a result of his discharge, less any net interim earnings, plus interest, plus reasonable search-for-work and interim employment expenses and compensation for any consequential economic harm resulting from his discharge.

WE WILL remove from our files all references to the discharge of **SCHNEIER**, and **WE WILL** notify him writing that this has been done and that the discharge will not be used against him in any way.

KHAVKIN CLINIC PLLC

(Employer)

Dated: _____

By: _____
(Representative) (Title)



The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. We conduct secret-ballot elections to determine whether employees want union representation and we investigate and remedy unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below or you may call the Board's toll-free number 1-866-667-NLRB (1-866-667-6572). Hearing impaired persons may contact the Agency's TTY service at 1-866-315-NLRB. You may also obtain information from the Board's website: www.nlr.gov.

2600 North Central Avenue
Suite 1400
Phoenix, AZ 85004

Telephone: (602)640-2160

Hours of Operation: 8:15 a.m. to 4:45 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the above Regional Office's Compliance Officer.

CERTIFICATE OF SERVICE

I hereby certify that the **GENERAL COUNSEL'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE** in Cases 28-CA-220023 and 28-CA-223014 was served via E-Gov, E-Filing, and E-Mail, on this 3rd day of October 2019, on the following:

Via E-Gov, E-Filing:

Honorable John T. Giannopoulos
Administrative Law Judge
NLRB Division of Judges, San Francisco Branch
901 Market Street, Suite 300
San Francisco, CA 94103-1779

Via Electronic Mail:

Jason D. Guinasso, Attorney at Law
Hutchison & Steffen, PLLC
500 Damonte Ranch Parkway, Suite 980
Reno, NV 89521
Email: jguinasso@hutchlegal.com

Christian Gabroy, Attorney at Law
Gabroy Law Offices
170 South Green Valley Parkway, Suite 280
Henderson, NV 89012-3145
Email: christian@gabroy.com

Michael Schneier
Email: mdschneier@mac.com



Dawn M. Moore
Administrative Assistant
National Labor Relations Board
Region 28 - Las Vegas Resident Office
Foley Federal Building
300 Las Vegas Boulevard South, Suite 2-901
Las Vegas, Nevada 89101
Telephone: (702) 820-7466
Facsimile: (702) 388-6248
E-Mail: Dawn.Moore@nlrb.gov